NO. 80066-9

DOCKET NO. 80066-9
SUPREME COURT OF THE STATE OF WASHINGTON

GARY PARDEE,

Respondent/Petitioner,

vs.

WILLIS JOLLY,

Appellant/Respondent.

SUPPLEMENTAL BRIEF OF RESPONDENT, WILLIS JOLLY

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IDENTITY OF RESPONDENT

The Respondent is Willis Jolly ("JOLLY"). JOLLY was the Defendant and the prevailing party in the Court of Appeals decision after having lost at the Superior Court trial. JOLLY is responding to PARDEE'S petition to this Court seeking review.

ISSUES IN SUPPLEMENT TO ALL BRIEFS PREVIOUSLY SUBMITTED

1. Does the Court have jurisdiction to act in equity when there is adequate remedy at law?

2. Do the equitable factors of Wharf apply in this case?

STATEMENT OF THE CASE

Respondent hereby adopts all prior statements of the case submitted by Respondent JOLLY in previously submitted Briefs.

ARGUMENT

I. AN ADEQUATE REMEDY AT LAW EXISTS.

Since an adequate remedy at law exists, there is no jurisdiction for the Court to apply equity. Petitioner in his Reply Brief asserts that, because no authority was cited for the legal principle that an adequate remedy at law supercedes the application of equity that, therefore, such proposition cannot stand. Such assertion is misplaced. A well-settled axiom of law can be applied by the Supreme Court simply because it is the

law. In Ritterhoff v. Puget Sound National Bank, 37 Wash. 76, 79 P.601(1905), the Court stated as follows:

> In defining the jurisdiction of courts of equity, it is a well established principle that equity will not relieve when there is a full, adequate and complete remedy at law. To deprive such courts of jurisdiction, it is not sufficient that there may be some remedy at law which may be enforced at some indefinite time in the future, but such remedy must be plain, adequate, and complete.
>
> In general, courts of equity will not assume jurisdiction, where the powers of the ordinary courts are sufficient for the purposes of justice. Ritterhoff, at 80.

In Anderson v. Provident Life and Trust Company, 25 Wash. 20, 64 P.933 (1901), the Court recognized that an adequate remedy at law precludes a remedy in equity. However, the Court carved out an exception where the issue in real property involved a fraudulent conveyance.

> The existence of a remedy at law does not interfere with the right of a creditor to resort to a court of equity to secure a cancellation of a fraudulent conveyance, as an obstacle in the way of the full enforcement of a judgment, and a cloud on the title to the property sought to be reached. . . Anderson at 26.

In a case involving the sale of real estate, the Court in Decker v. Schulze, 11 Wash. 47, 39 P.261 (1895), specifically, the Court noted as follows:

> Appellants, by their complaint, invoked the equity powers

> of the court to procure a rescission. Respondents concede that appellants have a right of action, but insist that it must be at law for damages.

The Court later on makes a distinction between real estate contracts that have been fully executed, as opposed to contracts that have not been completed. Decker at 51, 53. Where, as in this case, a contract is fully executed, then the Decker court states the remedy is limited to the law, not equity.

In the case at bar, the Court is addressing issues surrounding a fully executed contract, to-wit, an option contract. The remedy available to the Plaintiff (if any) is limited to damages under the terms of the contract. It first requires a finding of a breach of contract by the Defendant, which is the subject of dispute in this appeal. However, even if the Defendant (Respondent) was in breach of contract, there is an adequate remedy at law to the Plaintiff by awarding Plaintiff his financial loss in damages. Nevertheless, the principle applies with legal authority stated herein. An adequate remedy at law exists which precludes a remedy in equity.

II. EQUITABLE FACTORS FOUND IN WHARF DO NOT EXIST IN THIS CASE.

The elements stated in Wharf do not apply to this case. The Respondent will not repeat, but simply incorporate by reference the

Respondent's Brief submitted as Response to Petition for Discretionary Review and direct the Court's attention again to Pages 9-11 set forth therein. However, some additional emphasis is set forth herein not previously enunciated.

In the Wharf Restaurant, Inc. v. Port of Seattle, 24 Wn.App. 601, 605 P.2d 334 (1979), the Court enunciated certain criteria for applying equitable principles.

> The following "special circumstances" existed in this case, taken together, justify the trial court's decision to grant specific performance of the old lease between the Port and the Wharf for an additional 5-year term despite the Wharf's late notice. Id., at 612.
>
> The Court went on to state five (5) criteria that it looked at.
>
> 1. The failure to give notice was purely inadvertent. . .
>
> 2. An inequitable forfeiture would have resulted had equity not intervened. . .
>
> 3. As a result of the Wharf's failure to give timely notice, the Port did not change its position in any way and was not prejudiced thereby. . .
>
> 4. The lease was for a long term, not a short term. . .
>
> 5. There was no undue delay in the giving of notice by the Wharf. . .

Id.

In the Wharf, id., case, the Court specifically found at the trial level

that the Petitioner's failure to execute the option was "purely inadvertent." In the case at bar, however, there are no findings that the Petitioner herein inadvertently failed to exercise his option. See Corrected CP at 101-105. In fact, the record suggests his failure to act was intentional.

In the Wharf, id., case, the Court, in expanding on Item No. 2, determined that the Trial Court had found that substantial, permanent improvements had occurred prior to the expiration of the lease.

In contrast, in the case at bar, there is no Finding of Fact from the Court stating or even hinting at the Petitioner making any substantial, permanent improvements. See Corrected CP at 101-105. The record may provide some evidence of such, but it does not identify the timing and whether those improvements occurred during the contract period or after the contract had expired. A Finding of Fact was specifically entered at 1.18 stating as follows:

> That Mr. Pardee had and continues to have exclusive possession of the real property (and all of its improvements) from January 18, 2004 to the present.

Corrected CP at 101-105.

At the time that the Findings of Fact were signed, it was October 7, 2005. The record reflects that the Court's decision after trial was September 28, 2005. In other words, the Petitioner had been on the

property and in exclusive possession of the property for over a year and a half before a decision was rendered by the Court. Whether and to what extent improvements had been made on the property and when those improvements were made in relationship to the contract has not been found by the Court in any manner and should require additional adjudication and fact-finding with live testimony, if necessary.

All of the other reasons for distinguishing the Wharf case from the case at bar have been previously submitted in Respondent's Responsive Brief as referenced hereinabove.

CONCLUSION

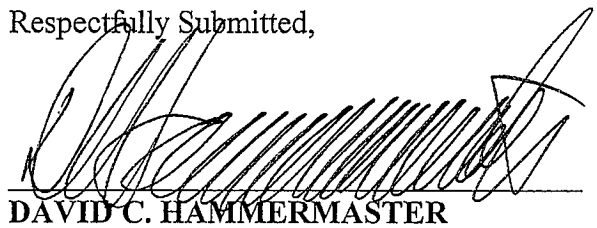
The Court should affirm the Court of Appeals' decision. The narrow exception carved out in the Wharf case simply does not apply in this case. The option agreement was for a very short term, and the failure to give notice was not "purely inadvertent."

Furthermore, there is no finding that the Petitioner made substantial improvements, nor is there any finding that, if there were any substantial improvements made by the Petitioner, it was done during the term of the option contract as opposed to after the expiration of the option contract. Finally, the other elements as set forth in the Wharf case and as previously argued do not apply; and, therefore, it is respectfully requested

that the Supreme Court affirm the Court of Appeals' decision.

DATED this 8th day of February, 2008.

Respectfully Submitted,



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